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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
Supreme Court of the State of California

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	3
Statement of the case	3
Reasons for granting the writ	7
1. The California Supreme Court's test for application of the actual malice standard was proscribed in Gertz v. Robert Welch, Inc., and as a result of the decision, the actual malice standard is now denied to all publications criticizing commercial conduct	7
2. Lower court decisions conflict over whether the differences between corporations and natural persons require that the actual malice standard be applied differently to each	11
3. Petitioners were denied due process under the Fourteenth Amendment because the California Supreme Court violated its own case law requiring it to consider all arguments supporting a judgment	14
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Accardi v. Shaughnessy, 347 U.S. 260 (1954)	15
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	16
Boddie v. Connecticut, 401 U.S. 371 (1971)	16
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	5
D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10 (1974)	14
Davey v. Southern Pacific Co., 116 Cal. 325, 48 P. 117 (1897)	14
Federal Trade Commission v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968)	10
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	7, 8, 9, 11, 12, 13, 17
Lewis v. Time, Inc., 83 F.R.D. 455 (E.D. Cal. 1979)	15
Lindsey v. Normet, 405 U.S. 56 (1972)	16

Table of Authorities Cited

Cases

Page

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) 12, 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 3, 5, 16, 17

People v. Disbrow, 16 Cal. 3d 101, 127 Cal. Rptr. 360, 545 P.2d 272 (1976) 14

People v. Brisendine, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975) 14, 15

Reliance Insurance v. Barron's, 428 F. Supp. 200 (S.D.N.Y. 1977) 11

Reliance Insurance v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) 9, 10, 13

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 8, 9, 11

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 9

Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) 9, 10, 13

United States v. Nixon, 418 U.S. 683 (1974) 16

Yellin v. United States, 374 U.S. 109 (1963) 15, 16

Statutes

28 U.S.C. section 1257(3) 2

Constitutions

California Constitution, Article I, section 2 ..... 3, 15, 17

United States Constitution:

First Amendment 3, 7, 11

Fourteenth Amendment 3

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VS.

WESTERN INSTITUTE OF RETAILING, INC.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
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Petitioners American Broadcasting Companies, Inc., Christine Lund, Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of California, entered on November 29, 1979, on which rehearing was denied on January 17, 1979.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), and is set forth in Appendix pages A-1 through A-11. The order denying petitioner's petition for rehearing was not

published but is set forth in Appendix page B-1. The opinion of the California Court of Appeal was initially published but, pursuant to California procedure, was automatically vacated and deleted from the reports when the California Supreme Court granted a hearing. It is reported unofficially at 4 Media L. Rptr. 1990 (1979), and appears in Appendix pages C-1 through C-14. The order of the California Court of Appeal denying respondents' petition for rehearing is not published but is set forth in Appendix page D-1. The judgment of the Superior Court of the State of California in favor of petitioners American Broadcasting Companies, Inc., and Christine Lund was not published but appears in Appendix pages E-1 through E-2. The judgment of the Superior Court of the State of California in favor of petitioners Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer was not published but appears in Appendix pages F-1 through F-4.

JURISDICTION

On November 29, 1979, the California Supreme Court filed its order reversing the judgments of the trial court in favor of petitioners. A petition for rehearing was timely filed on December 14, 1979, and was denied on January 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Did the California Supreme Court err in denying a news broadcaster who reported Better Business Bureau allegations of fraudulent merchandising practices the protection of the actual malice standard of *New York Times*

Co. v. Sullivan in a defamation suit where the reason for denying the standard's protection was that "criticism of commercial conduct does not merit the special protection of the actual malice test"?

2. Did the California Supreme Court err in refusing to hold that the United States Constitution requires corporate plaintiffs in defamation actions to prove actual malice whether or not they are public figures?

3. Did the California Supreme Court violate the rights of petitioners to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution when, in violation of California law, it refused to consider arguments under Article I, section 2 of the California constitution which, if accepted, would require affirmance of the judgment of the trial court?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

There are two groups of petitioners represented below by separate counsel. The first consists of American Broadcasting Companies, Inc. ("ABC"), which owns San Francisco television station KGO-TV Channel 7, and Christine Lund, who at relevant times was a consumer affairs re-

porter for the station. The second group of petitioners consists of Better Business Bureau of San Francisco, Ltd. ("Better Business Bureau"), Charles R. Thurber, who at relevant times was president of Better Business Bureau, and Louis Keefer, who at all relevant times was a Better Business Bureau investigator. Respondents Western Institute of Retailing, Inc. and Vegod Corporation are corporations organized under the laws of California.

Petitioners adopt as part of their Statement of the Case the following paragraphs from the opinion of the California Supreme Court:

> Respondent corporations are engaged in closing out stores that have failed or are going out of business. Respondents arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark store". When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Respondents also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.
>
> A Better Business Bureau spokesman advised a KGO-TV reporter [petitioner Lund] that [respondents] were selling inferior merchandise at inflated prices. KGO-TV notified respondents of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the closeout

> campaign. The watchdog agency says two outside companies, Vega [sic] Corporation and Western Institute of Retailers [sic], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all. (App., p. A-2.)

Respondents filed a defamation action in April 1972 against petitioners. Prior to empaneling the jury, the trial court ruled that respondents were "public figures" within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and its progeny, and, therefore, were required to prove "actual malice" as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Respondents stipulated that they could not prove actual malice, and judgments were entered against them and in favor of each of the two groups of petitioners.

Respondents appealed to the California Court of Appeal, claiming that the trial court had erred in ruling they were public figures. Petitioners contended that respondents were public figures and that the decision should be affirmed for the additional reason that California law as well as the federal constitution required application of the actual malice standard. The Court of Appeal affirmed the judgment of the trial court and held that respondents (collectively referred to by the court as "Vegod") were public figures:

> From the foregoing uncontroverted evidence and discussion we conclude as a matter of law: (1) that the "demise" of the City of Paris and the disposition of its merchandise were matters of legitimate "public inter-

> est"; (2) that Vegod, an otherwise private person, voluntarily injected itself into those matters of public interest by its widespread advertising, and its management, of the store's "closeout" sale; and (3) that Vegod thereby became a "public figure" within the meaning of *Curtis Publishing Co. v. Butts* and *Gertz v. Robert Welch, Inc.* (App., p. C-10.)

The Court of Appeal did not reach the state law ground for affirmance because its determination that respondents were public figures disposed of the appeal. Respondents petitioned the Court of Appeal for a rehearing and the petition was denied.

Thereafter, respondents' petition for a hearing before the California Supreme Court was granted. A majority of the justices of the California Supreme Court reversed the trial court and held that respondents were not required to prove actual malice. The reasoning of the majority was that the subject matter of the news reports—deceptive merchandising practices perpetrated on shoppers during a closeout sale at a long-respected department store—did not merit the protection of the actual malice standard. According to the majority:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (App., p. A-8.)

In reversing the Court of Appeal and the trial court, the California Supreme Court cited no authority for its holding, nor did it disclose its reasoning. The court did not consider petitioners' alternative argument that respondents were required by California law to prove actual malice whether or not respondents were public figures for federal

constitutional purposes. Petitioners raised these points in their petition for rehearing which was denied without opinion on January 17, 1980.

Two justices of the California Supreme Court dissented. They agreed with the lower courts that respondents were public figures, and concluded that the federal and the California constitutions required application of the actual malice standard.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court's Test for Application of the Actual Malice Standard was Proscribed in Gertz v. Robert Welch, Inc., and as a Result of the Decision, the Actual Malice Standard Is Now Denied to all Publications Criticizing Commercial Conduct

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), determined the extent to which the federal constitution derogates from the common law rule of strict liability for defamatory publications. *Gertz* held that liability for defamation could never be imposed absent a showing of fault. Where the plaintiff is a public official or a public figure, the fault must constitute "actual malice", namely, publication with knowledge of falsity or in reckless disregard for truth or falsity.

Plaintiffs are required to prove fault in defamation actions because misstatements are inevitable, and, therefore, a rule of strict liability does not adequately protect First Amendment freedoms:

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless

> inevitable in a free debate . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).]

Public figures are required to prove "actual malice" because they have invited attention and comment through the prominence they have assumed in the affairs of society. *Id.* at 345.

Gertz rejected the plurality opinion in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). The *Rosenbloom* approach did not depend upon the public or private character of the plaintiff, but required proof of actual malice whenever society had a sufficient interest in learning about the substance of the communication. *Rosenbloom* therefore focused on the societal value of the communication rather than the public or private character of the plaintiff.

Here, the majority of the California Supreme Court cited *Gertz* but followed the *Rosenbloom* approach. The court's holding was that respondents were not required to prove actual malice against petitioners because the subject matter of the news report did not deserve protection. The subject matter was deceptive merchandising practices perpetrated against the public at a closeout sale of a "respected" 122-year-old "landmark" department store. According to

the California Supreme Court majority, comment on deceptive merchandising practices exposes the broadcaster to the full range of defamation liability because:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (App., p. A-8.)

This Court rejected *Rosenbloom*'s focus on the subject matter of the communication because, among other reasons, it requires courts to determine " 'what information is relevant to self government' ". *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346; *Accord, Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

This case demonstrates dramatically the dangers inherent in conditioning the actual malice standard on a judicial determination of "relevancy" of subject matter. Regardless of the public or private character of a plaintiff, California has exempted from the protection of the actual malice standard all communications about matters of interest to consumers—for no reason other than that the California Supreme Court considers such communications undeserving of such protection, notwithstanding that other courts routinely recognize the worth of consumer reporting. Among the decisions praising such reporting are two which are cited favorably by the California Supreme Court in its majority opinion: *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977), and *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977). *Trans World Accounts* found consumer reporting "essential" to protect the public:

> If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him utilizing such prohibitive conduct. [425 F. Supp. at 820, *quoting Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968).]

In *Reliance Insurance,* the court commended Barron's for reporting on a stock offering while it was being proposed and, therefore, while there was still time to warn the public:

> It is beyond dispute that the article would have its greatest impact on the public if it appeared prior to the sale. This desire to publish prior to the sale is praiseworthy rather than blameworthy. Prior to the sale, the offering was "hot news" in the financial community. If the function of the financial press is to inform and educate the investing public with hot news, which we believe it is, then the editors have an actual duty to publish at the time of greatest benefit. After the issue had been sold, news bearing on its investment quality would have been of no use to the readers. (442 F. Supp. at 1351.)

Another opinion in *Reliance Insurance v. Barron's* also stressed the importance of consumer reporting:

> Investigative reporting is not limited to the impeachment of presidents or the exposure of licentious congressmen. The public interest is served equally when reporters find a "Deep Throat" in the executive suite, and when an accounting professor spotlights for the financial press, in common language, business dealings he regards as improper, improvident or unfair to investors. Whether his conclusions are right is to be re-

> solved generally in the free marketplace of ideas. [428 F. Supp. 200, 205 (S.D.N.Y. 1977).]

The California Supreme Court not only revived the *Rosenbloom* opinion which was discredited by this Court in *Gertz*, it used *Rosenbloom* to reach a result that is as aberrational as it is unconstitutional. In denying petitioners the protection of the First Amendment, the court excluded from protection, as "undeserving", all communications criticizing commercial conduct—communications of the highest social utility.

The California Supreme Court's decision will have a chilling effect on consumer reporting. Deprived of the protection of the actual malice standard, news reports of deceptive merchandising practice and dangerous products will more frequently become subject to litigation. Lawsuits will be more protracted and expensive. Of necessity, publishers will be more timorous, and as a result the public will be denied information it needs to protect itself. Inevitably, the public will be the loser. This constriction in the flow of information to the public is precisely that which this Court sought to eliminate by its decision in *Gertz v. Robert Welch, Inc.*

2. Lower Court Decisions Conflict Over Whether the Differences Between Corporations and Natural Persons Require that the Actual Malice Standard Be Applied Differently to Each.

This Court has never decided a defamation action in which the plaintiff is a corporation. The distinction between corporations and natural persons is significant in defamation cases because, unlike persons, corporations have no pri-

vate lives and cannot suffer shame, mortification or hurt feelings. The only injury corporations can suffer is financial.

The United States District Court for the District of Columbia in *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976), analyzed the differences between corporations and individuals in the context of defamation law. The court concluded that corporate plaintiffs require less protection than persons and should be required to prove actual malice even when they are not public figures:

> Corporations, which do not possess private lives to begin with, must similarly be denied full protection from libel. Stated another way, the "public figure" standards set out in *Gertz* are designed to ascertain whether a person, through his activities, has lost claim to his private life. It makes no sense to apply these standards to a corporation, which, regardless of its activities, never has a private life to lose. . . . It is, therefore, the holding of this court that actual malice must be proved with convincing clarity in any libel action brought by a corporation against a mass media defendant, if the defendant establishes that the publication in issue concerns matters of legitimate public interest. (417 F. Supp. at 955-56.)

The approach of *Martin Marietta* is consistent with the rationale of this Court's holding in *Gertz v. Robert Welch, Inc.* This Court emphasized therein that the public figure test for determining application of the actual malice standard is an accommodation between two legitimate, competing interests: the interest of the state in providing com-

pensation for injurious falsehoods and the interest of society in avoiding news media self-censorship with the consequent deprivation of information. The district court in *Martin Marietta* recognized that corporations require less protection from injurious falsehoods than individuals, and, therefore, reached a different accommodation between the two competing interests.

Two other federal district courts have declined to distinguish between corporations and persons in applying the actual malice standard: *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977), and *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (N.D. Cal. 1977). This was the view of the California Supreme Court in this case.

A fundamental conflict, therefore, exists among lower courts as to how the competing societal interests identified in *Gertz* should be reconciled where the plaintiff is a corporation. The necessity for this Court to resolve the issue is manifest because of the pervasive influence of corporations. Corporations dominate the manufacturing and marketing sectors of the economy, and news reports informing the public about products or merchandising practices will predominately involve corporations. A decision by this Court defining the actual malice standard as applied to corporate plaintiffs will resolve the conflict in the circuits and determine the extent to which publishers can inform the public on corporate activities.

3. Petitioners Were Denied Due Process Under the Fourteenth Amendment Because the California Supreme Court Violated Its Own Case Law Requiring It to Consider All Arguments Supporting a Judgment.

California law requires an appellate court to affirm the holding of a lower court if there is any basis on which the holding can be sustained:

> "The fact that the action of the [lower] court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [*D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 18-19, 112 Cal. Rptr. 786, 799 (1974), *quoting Davey v. Southern Pacific Co.*, 116 Cal. 325, 329, 48 P. 117 (1897).]

Petitioners argued in the California Court of Appeal and in the California Supreme Court that the California constitution, as well as the federal constitution, required respondent corporations to prove actual malice. The argument was based on the responsibility of California courts to interpret the California constitution independently of the federal. *People v. Disbrow*, 16 Cal. 3d 101, 114-15, 127 Cal. Rptr. 360, 368 (1976); *accord, People v. Brisendine*, 13

Cal. 3d 528, 549-50, 119 Cal. Rptr. 315, 318-29 (1975). In discharging this responsibility, the California Supreme Court has held that article 1, section 2 of the California constitution requires that the rights of free speech and free press require "great solicitude":

> A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press. . . . [I]n this state we have consistently viewed with great solicitude the right to uninhibited comment on public issues. (*Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 458 (1975).)

This language has been suggested as compelling application of the actual malice standard even where the federal constitution does not. *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).

Because the court of appeal affirmed the trial court on the federal constitutional ground, California law did not require it to consider the alternative state law ground. The California Supreme Court, however, rejected the federal constitutional ground, and as a result was required to consider the state ground—but did not. In their petition for rehearing, petitioners drew the court's attention to the alternative state ground for supporting the trial court's judgment and to the court's duty under California law to rule. The petition was denied without opinion.

This Court has held that lawful rules and procedures are binding on the government officials and agencies that promulgate them. *Yellin v. United States*, 374 U.S. 109 (1963); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This

principle applies to the executive branch (*United States v. Nixon*, 418 U.S. 683 (1974)), and the legislative (*Yellin v. United States*, 374 U.S. 109 (1963)). Although no court known to petitioners has so held, petitioners contend that the due process clause requires no less from the judicial branches of state governments.

Application of the principle to the judicial branch is especially appropriate in this case because due process also requires "that there be an opportunity to present every available defense". *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The opportunity must be granted in a meaningful time and manner. *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). The obvious purpose of the California rule requiring a court to consider all grounds supporting a lower court decision is that it avoids a wasteful remand for further proceedings that will inevitably result in affirmance. The rule assures that issues are resolved expeditiously.

The court's only explanation for its refusal to consider petitioners' state law argument in support of the judgment requiring proof of actual malice was that respondents' stipulation of their inability to prove malice was "limited to the First Amendment privilege under *New York Times v. Sullivan*", 376 U.S. 254 (1964). This is a misinterpretation of the record because respondents' stipulation was not so limited. Respondents stipulated that they could not prove "actual malice *within the meaning* of *New York Times v. Sullivan*" (Clerk's Trans., p. 110, ll. 9-10 [emphasis added]). Petitioners' argument was that California law

under the circumstances of this case required proof of actual malice *within the meaning* of *New York Times*. Thus, respondents' stipulation was effective and the California Supreme Court was required under state law to address the issue.

This case began in October 1972, almost eight years ago. To require petitioners to reargue a question of law in the trial court which must be ultimately determined on appeal will put them to needless expense, cause unnecessary delay, and deny them due process by denying them a meaningful hearing on all arguments at a meaningful time.

CONCLUSION

The California Supreme Court applied a "subject matter" standard for the actual malice test that this Court specifically rejected in *Gertz*. It denied to all consumer reporting the protection of the actual malice standard and thereby denied the public access to information it needs to protect itself from fraudulent merchandising practices and dangerous products. The court violated California law by refusing to consider petitioners' argument that article 1, section 2 of the California constitution requires respondents to prove actual malice.

Review by this Court of the decision will not only correct the errors of the California Supreme Court and destroy the precedential effect of an unconstitutional opinion, it will also resolve the significant conflict that exists among the circuits concerning the circumstances under which corporate plaintiffs must prove actual malice in defamation actions.

For the foregoing reasons, petitioners respectfully request that this Court grant a writ of certiorari to review the decision of the California Supreme Court.

Dated: April 16, 1980

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

In the Supreme Court
of the
State of California

S.F. 23999
Super. Ct. 652-227

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Nov. 29, 1979]

SEE DISSENTING OPINION

In this defamation action the trial court ruled that plaintiffs are "public figures" within the meaning of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 and that actual malice is an essential element of plaintiffs' cause of action. Plaintiffs conceded they are unable to prove defendants acted with actual malice within the holding of New York Times v. Sullivan (1964) 376 U.S. 254. Judgment was granted defendants, and plaintiffs appeal. We reverse.

Plaintiff corporations are engaged in closing out stores that have failed or are going out of business. Plaintiffs arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark

store." When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Plaintiffs also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.

A Better Business Bureau spokesman advised a KGO-TV news reporter that plaintiffs were selling inferior merchandise at inflated prices. KGO-TV notified plaintiffs of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [*sic*] Corporation and Western Institute of Retailers [*sic*], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

In New York Times v. Sullivan, *supra,* 376 U.S. 254, 269 et seq., the Supreme Court determined that public officials may not recover damages for defamation unless they show defendant acted with actual malice. While recognizing the First Amendment does not protect libelous statements, the court reasoned that erroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable

self-censorship. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (376 U.S. at p. 279.) The court defined "actual malice" as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at pp. 279-280.)

Three years later in Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155, the court held that public figures —like public officials—must prove actual malice to recover for defamation. Although the court did not give us an encompassing definition of public figure, it held the plaintiffs in the two cases before it met the public figure test. In one, the plaintiff was an athletic director of a state university who was employed by a private corporation rather than the state. The libelous statement was a report covering an alleged conversation between him and a coach of another university and the ensuing football game between the two universities. Plaintiff in the second was a retired Army officer who had "thrust himself into the 'vortex' of the controversy" over admission of a black to a state university, and the libelous statement related to his conduct with respect to a riot at the university. (388 U.S. at pp. 140-142, 146.)

The Supreme Court again sought to strike a balance between vindication of honor through defamation law on one side and free speech and press protected by the First Amendment on the other in Gertz v. Robert Welch, Inc., *supra,* 418 U.S. 323. The court recognized that, while false statements of fact enjoy no constitutional protection, per-

mitting strict liability for false statement impairs First Amendment liberties by deterring speech that matters. The court also recognized the state has a legitimate interest in protecting reputation. The court defined public figures: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Id.*, at p. 351.)

Distinguishing between private and public figure the court reasoned that public figures ordinarily will have significantly greater access to the media to contradict lie and error than will private individuals, and that those classed as public have voluntarily thrust themselves to the fore, inviting attention and comment and exposing themselves to increased risk of defamatory falsehood. Private persons by contrast have not undertaken an " 'influential role in ordering society.' " (418 U.S. at pp. 344-345.)

Gertz was an attorney employed to bring a wrongful death action by the family of a person killed by a police officer convicted of second degree murder. The alleged libelous article asserted that the conviction was a frameup, part of a Communist conspiracy, and it claimed that Gertz had Communist connections.

Recognizing that Gertz had been active in community and professional affairs, the court stated: "We would not lightly assume that a citizen's participation in community

and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

"In this context it is plain that petitioner was not a public figure. He played a minimum role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S. at p. 352.)

Although private persons are not necessarily required to prove actual malice to recover for defamation, states may not impose liability without fault. In such cases, the state may determine the fault standard to apply. (418 U.S. at p. 347.)

In Time Inc. v. Firestone (1976) 424 U.S. 448, the court again considered the meaning of the term "public figure." Time magazine erroneously reported that a divorce

was granted to Mr. Firestone on grounds of extreme cruelty and adultery. Time argued that Mrs. Firestone was a "public figure" since the 17-month trial attracted national attention, eliciting 88 articles in Miami and Palm Beach newspapers. Mrs. Firestone had also given several press conferences and was a prominent member of Palm Beach society.

Rejecting Time's argument the court stated: "[P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 U.S., at 346, 94 S.Ct., at 3010 [¶] Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz,* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense

than that of the defendant called upon to defend his interests in court." (*Boddie v. Connecticut,* 401 U.S. 371, 376-377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971). Her actions, both in instituting the litigation and in its conduct were quite different from those of General Walker in *Curtis Publishing Co., supra.* She assumed no 'special prominence in the resolution of public questions.' *Gertz, supra,* 418 U.S., at 351, 94 S.Ct., at 3013. We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce." (424 U.S. at pp. 454-455; fn. omitted.)

Defendants argue that the demise and closing out sale of the City of Paris were matters of public controversy because it was a "landmark store." Even assuming the venerable store's planned destruction created a public controversy, those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark." Merely doing business with parties to a public controversy does not elevate one to public figure status.

Defendants also urge that by selling goods to the public and by advertising the sale plaintiffs became public figures. In *Gertz* the court in concluding that he was not a public figure pointed out that Mr. Gertz had never discussed the civil or criminal litigation with the press. In *Firestone* the court pointed out that Mrs. Firestone did not seek publicity on the propriety of her marital conduct.

While availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* (418 U.S. at p. 346), and in *Firestone* (424 U.S. at pp. 455-456), in favor of the public controversy test. (See also Hutchinson v. Proxmire (1979) 47 U.S.L. Week 4827, 4833-4834.)

Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.[1]

Pointing out that *Gertz* and *Firestone* relied on individual interests in reputation, one federal district court has held that in defamation actions corporations must prove malice in fact whenever the defamatory statement relates to a matter of public interest. (Martin Marietta Corp. v. Evening Star Newspaper (D.C. 1976) 417 F.2d 947, 954-956.) However, two other federal district courts have rejected the proposed distinction. (Reliance Insurance Co. v. Barron's (S.D.N.Y. 1977) 442 F.Supp. 1341, 1347-1348; Trans World Accounts, Inc. v. Associated Press (N.D. Cal. 1977) 425 F.Supp. 814, 819.)

---

[1]Because plaintiffs' stipulation related to the First Amendment privilege under New York Times v. Sullivan, *supra*, 376 U.S. 254, we consider only that federal privilege and do not express any view as to whether the statements were priviliged under California law.

In California, a corporation's right and redress against defamation is well established. (DiGiorgio Fruit Corp. v. American Federation of Labor (1963) 215 Cal.App.2d 560; Daniels v. Sanitarium Assoc., Inc. (1963) 59 Cal.2d 602, 609; Hotel and Restaurant Employees Union v. Anaheim Operating, Inc. (1978) 82 Cal.App.3d 737, 752; Triton Insurance Underwriters, Inc. v. Mutual Chiropractic Insurance Co. (1965) 232 Cal.App.2d 829, 832; see also, Civ. Code, § 45; Rest.2d Torts, § 561.)

Rejecting the distinction between individuals and corporations in *Martin Marietta*, the court in Trans World Accounts, Inc. v. Associated Press, *supra*, 425 F. Supp. 814, 819, reasoned: "[A]t least in this case governed by California substantive law, there is no distinction between the protectible interest in reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages. (*DiGiorgio Fruit Corp. v. American Federation of Labor*, 215 Cal. App.2d 560, 30 Cal.Rptr. 350, 355-356 (1963); compare Martin Marietta Corp. v. Evening Star, above, at 955. [¶] While it is true that the Supreme Court's opinions in these cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defama-

tion claims, the distinction between corporations and individuals is one without a difference."

The judgment is reversed.

CLARK, J.

WE CONCUR:
TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

Vegod v. American Broadcasting Companies, Inc.
S.F. 23999

DISSENTING OPINION BY NEWMAN, J.

Citing New York Times v. Sullivan, 376 U.S. at 269 et seq., the majority opinion concludes (*ante* p. 3): "[E]rroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable self-censorship."

The California Constitution ensures that those words apply here. Article I, § 2 commands that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

Was there an abuse of that right here? The majority so conclude, arguing (1) that the facts show no public controversy, and (2) that plaintiffs had not attained "public figure status". I disagree. I think it is clear that inner-city "close-out sales" in our era do inspire controversial concerns; and the "landmark" character of the building here merely helped to publicize those concerns and make them more newsworthy. Plaintiffs indeed did decide to thrust themselves into the vortex of that controversy, whether or not they already had become public figures.

NEWMAN, J.

I Concur:
BIRD, C.J.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jan. 17, 1980

I have this day filed Order

REHEARING DENIED

In re: SF No. 23999

VEGOD CORP.

vs.

AMER BROADCAST COS.

Respectfully,

G. E. BISHEL
Clerk

Appendix C

SEE DISSENTING OPINION

CERTIFIED FOR PUBLICATION

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civ. No. 42363
(Super. Ct. No. 652227)

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Jan. 3, 1979]

Vegod Corporation and Western Institute of Retailing, Inc., commenced an action for damages for slander against American Broadcasting Companies, Inc., American Broadcasting Company KGO-TV Channel 7, Better Business Bureau of San Francisco, certain of those defendants' employees, and others. Concluding that the plaintiffs were "public figures," and upon being advised that they were unable to prove the defendants' "actual malice" within the

requirement of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, the superior court entered judgments in favor of the defendants. Plaintiffs thereupon appealed.

The uncontroverted facts before the superior court and reasonable inferences therefrom were as follows.

The "City of Paris" was a well-known and long-respected San Francisco department store. Its age equaled that of the State of California; its doors were first opened in 1850. Apparently drawing upon judicial knowledge (see Evid. Code, § 451, subd. (f)), the superior court described it as a "landmark store," and counsel seemed in agreement that it was a highly regarded "department store that has been in San Francisco since the Gold Rush, that is famous for its Christmas celebrations that children of every age of San Francisco had been going to for years, . . ." But the "demise" of the store, in 1972, was imminent; the news media had widely reported that it soon would go out of business.

Plaintiffs are Vegod Corporation and Western Institute of Retailing, Inc., to whom collectively and for convenience we shall hereinafter refer in the singular as Vegod. Vegod had a common management, and to a large extent, common ownership. Vegod's "main business was the 'closing out' of . . . stores" that had failed, or were otherwise going out of business. Arrangements of some kind were made with the City of Paris for Vegod to conduct a "closing out," and "total," sale of its merchandise. The sale received wide newspaper advertising of thebargains to be found in the City of Paris merchandise inventory. In the course of the "closing out" sale, merchandise was brought into the store for sale by Vegod from as far away as Chicago. Indeed, "both plaintiffs brought in merchandise to the City of Paris from other

stores, . . ." And space was rented by Vegod to concessionaires who themselves "brought in merchandise in accordance with their own merchandising practices and procedures."

An official of Better Business Bureau of San Francisco interviewed a "KGO-TV Channel 7" news reporter. He advised her, among other things, that "shoppers who visited the City of Paris were likely to find 'distress' and out-of-season merchandise instead of the high-quality clothing normally offered by the store. [He] also stated that garments bore misleading tags which made it appear that clothing offered for sale at its full retail price was discounted in price," and that the price of merchandise offered to the public might be four times the price paid by Vegod.

Thereafter, upon notice to Vegod of the intent so to do in compliance with some official regulations, the reporter, with the approval of KGO-TV Channel 7, broadcast the following news report:

"The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly, but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [sic] Corporation and Western Institute of Retailers [sic] have been brought in to handle the close-out, a close-out the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

That broadcast, and some others which were similar in context, were the subjects of Vegod's action.

Pretrial conferences were held between the court and counsel for the respective parties. The discussions centered around whether Vegod was a "public figure" required by law to prove "actual malice" on the part of the defendants. Vegod, as previously indicated, conceded an inability to prove such "actual malice" by "clear and convincing evidence." After appropriate argument on this issue, the here questioned judgments were entered.

New York Times Co. v. Sullivan, supra, 376 U.S. 254, in 1964 announced the rule that a *"public official"* is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Pp. 279-280.) And, said the court, the proof of such "actual malice" must be made with "convincing clarity." (Pp. 285-286.)

Three years later the high court extended its rule to include "public figures." In *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 155, the court asserted: "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." The court carefully added: "Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, . . ."

A person may attain the status of a "public figure" in either of two ways, according to *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351: "That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.* In either case such persons assume special prominence in the resolution of public questions." (Emphasis added.)

It is the latter of the "two alternative bases" with which we are here concerned.

Some confusion attended the superior court proceedings of this case. The parties appear to have understood *Gertz v. Robert Welch, Inc.* as *necessarily* requiring a "public *controversy*" for the application of that authority's second alternative.

In *Gertz v. Robert Welch, Inc.*, there happened to have been a public *controversy* into which the court specifically found the plaintiff had not injected himself, and it accordingly addressed itself to the issue in what was there appropriate language. But from similar high authority it becomes manifest that the meaning is *a matter of "public interest"* which, of course, includes "public controversy." Thus, in *Curtis Publishing Co. v. Butts,* supra, 388 U.S. 130, where there had been no controversy before the claimed defamation of a "public figure," the members of the court described the criteria as those of "public interest," and the public's

"legitimate and substantial interest." (Pp. 149, 154-155, 165.) Likewise in *Time, Inc. v. Hill* (1967) 385 U.S. 374, 383-387, the court spoke only of "public interest," and "substantial public interest," as the necessary element of *New York Times Co. v. Sullivan's* First Amendment privilege.

Lesser federal courts have variously described the required element as a matter of "public interest" (Man v. Warner Bros. Inc. (S.D.N.Y. 1970) 317 F.Supp. 50, 52-53; Konigsberg v. Time, Inc. (S.D.N.Y. 1970) 312 F.Supp. 848, 851), "great public interest" (Dacey v. Florida Bar, Inc. (5th Cir. 1970) 427 F.2d 1292, 1295; Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970) 426 F.2d 858, 861), "legitimate public interest" (Bon Air Hotel, Inc. v. Time, Inc., supra, p. 861, fn. 3; Martin Marietta Corp. v. Evening Star Newspaper (D.D.C. 1976) 417 F.Supp. 947, 956), "public or general concern" (Rosanova v. Playboy Enterprises, Inc. (S.D.Ga. 1976) 411 F.Supp. 440, 444), or " 'in which the public has a justified and important interest' " (Cepeda v. Cowles Magazines and Broadcasting, Inc. (9th Cir. 1968) 392 F.2d 417, 419 [cert. den., 393 U.S. 840]), or which is "naturally entitled to public gaze and interest" (United Medical Laboratories v. Columbia Broadcasting Sys. (9th Cir. 1968) 404 F.2d 706, 712 [cert. den., 394 U.S. 921]). No such authority is found which requires a "public *controversy*."

We continue our consideration of *Gertz v. Robert Welch, Inc.*'s second basis for status as a "public figure," i.e., where the "individual voluntarily injects himself" into a matter of

public interest. Such a party, while not "a public figure for all purposes" (Martin Marietta Corp. v. Evening Star Newspaper, supra, 417 F.Supp. 947, 957), is nevertheless "a public figure for a limited range of issues" (418 U.S., p. 351). Having voluntarily injected himself into a matter of public interest, he becomes a "public figure" in respect of that matter, within the meaning of *New York Times Co. v. Sullivan, Curtis Publishing Co. v. Butts,* and *Gertz v. Robert Welch, Inc.*

We point to a few illustrations where one seeking damages for defamation has been held a "public figure" within the meaning of this rule.

Dacey v. Florida Bar, Inc., supra, 427 F.2d 1292: Dacey, a private person and author, who made many radio and television appearances promoting his book, thereby became "a public figure" unentitled to damages for lack of proof of actual malice, following a personal defamatory attack upon him in a review of the book. *Martin Marietta Corp. v. Evening Star Newspaper,* supra, 417 F.Supp. 947: An otherwise private corporate contractor, by engaging in national defense contracts, thereby became a "public figure," subject to *New York Times Co. v. Sullivan*'s required proof of actual malice, in a defamation action against a newspaper which had published a story of its alleged improper relations with government officials. *Buchanan v. Associated Press* (D.D.C. 1975) 398 F.Supp. 1196: Buchanan, a privately practicing accountant, voluntarily involved himself in a political campaign. He was held a "public figure" in respect of claimed libelous publications relating to the campaign's irregular financing. *Rosanova v. Playboy Enter-*

prises, Inc., supra, 411 F.Supp. 440, 442: Rosanova, a private person, who disported himself with notorious underworld figures, thereby attained the status of a "public figure" in respect of a defamatory publication referring to a "'host of California mobsters, including . . . Rosanova'" *Man v. Warner Bros. Inc., supra,* 317 F.Supp. 50: Man, a private person and musician, became a "public figure" in relation to a "Woodstock Festival" where he voluntarily performed before many people, thus foregoing claim for damages against Warner Bros. Inc. for filming and recording his rendition for profit.

Vegod relies heavily upon the cases of *Time, Inc. v. Firestone* (1976) 424 U.S. 448, and *Gertz v. Robert Welch, Inc.,* supra, 418 U.S. 323, where the allegedly defamed persons were not held to *New York Times Co. v. Sullivan's* strict requirement of establishing actual malice. We find them to be of no aid to Vegod. In *Time, Inc. v. Firestone,* the high court found the Firestones' divorce dispute was "not the sort of 'public controversy' referred to in Gertz" (p. 454) even though of morbid interest to some. And the court expressly concluded that by their appearance in the divorce action the parties had *not* "'*voluntarily* exposed [themselves] to increased risk of injury from defamatory falsehood, . . .'" (P. 456; emphasis added.) In *Gertz v. Robert Welch, Inc.,* a lawyer had represented the family of a homicide victim in a civil action against his alleged murderer. His participation in the overall affair "related solely to his representation of a private client" (p. 352), and he had taken no part in the criminal prosecution resulting in a murder conviction. The high court stated: "He plainly did

not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S., p. 352.) In neither of these cases had the allegedly defamed person become *voluntarily* involved in a matter of public interest.

The need that a private person *voluntarily* inject himself into a matter of public interest in order to acquire "public figure" status has otherwise been manifested by the nation's high court. In *Gertz v. Robert Welch, Inc.*, the court expressly repudiated its earlier plurality opinion holding that "a private citizen *involuntarily* [emphasis added] associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test." (418 U.S., pp. 337-339; and see Trans World Accounts, Inc. v. Associated Press (N.D.Cal. 1977) 425 F.Supp. 814, 818-819; Rosanova v. Playboy Enterprises, Inc., supra, 411 F.Supp. 440, 443.)

Vegod's only contention on its appeal is expressed in this manner: "The court erred in classifying plaintiffs Vegod and [Western Institute of Retailing, Inc.] as 'public figures' within the meaning of *Curtis Publishing Co. v. Butts,* 388 U.S. 130 . . . and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, . . ."

That determination was, of course, a question of law for the superior court as it is now for this court (Rosenblatt v. Baer (1966) 383 U.S. 75, 88; Rosanova v. Playboy Enter-

prises, Inc., supra, 411 F.Supp. 440, 444; Hotchner v. Castillo-Puche (S.D.N.Y. 1975) 404 F.Supp. 1041, 1045; Walker v. Colorado Springs Sun, Inc. (Colo. 1975) 538 P.2d 450, 459 [cert. den., 423 U.S. 1025].)

From the foregoing uncontroverted evidence and discussion we conclude as a matter of law: (1) that the "demise" of the "City of Paris" and the disposition of its merchandise were matters of legitimate "public interest"; (2) that Vegod, an otherwise private person, voluntarily injected itself into those matters of public interest by its widespread advertising, and its management, of the store's "close out" sale; and (3) that Vegod thereby became a "public figure" within the meaning of *Curtis Publishing Co. v. Butts* and *Gertz v. Robert Welch, Inc.*

Vegod accordingly had the burden of establishing by evidence of convincing clarity that the defendants acted with "actual malice" in respect of the alleged defamatory television news reports. Vegod having conceded an inability to do so, the superior court did not err in entering judgments for the several defendants.

We have found it unnecessary to our disposition of Vegod's appeal to consider the limitation, if any, upon a corporation's right, as distinguished from that of an individual, to recover for wrongful defamation. (Cf. Trans World Accounts, Inc. v. Associated Press, supra, 425 F. Supp. 814, 818.) Nor have we drawn the suggested distinction between the Better Business Bureau of San Francisco's right of free speech, and the other defendants' guaranteed freedom of the press. "[I]t is immaterial whether the words be publicly spoken from the stage or

upon the hustings, or go out to the world through the channels of the printing-press. By the constitutional provision we are about to invoke a citizen may speak, write, or publish his sentiments with equal freedom, . . ." (Dailey v. Superior Court (1896) 112 Cal. 94, 96-97; In re Lyons (1938) 27 Cal.App.2d 293, 299.) And the "Supreme Court of the United States has made it clear that there is little essential difference between freedom of speech as opposed to freedom of press. The two freedoms have been amalgamated in language such as '. . . constitutional limits of free expression . . .' (Pennekamp v. State of Florida, 328 U.S. 331, 335, . . ." (Klahr v. Winterble (Ariz. 1966) 418 P.2d 404, 415.)

The judgments, and each of them, are affirmed.

CERTIFIED FOR PUBLICATION

Elkington, J.

I concur:

Racanelli, P.J.

I dissent.

With all respect to my colleagues, theirs is an unwarranted extension of the rationale of *New York Times v. Sullivan, Curtis* and *Gertz.**

The plaintiff here is a liquidator, not a legislator, and no salutary public purpose is served by conferring so broad an immunity on its alleged detractors.

Nor can I agree that the shadowy extensions expressed in decisions of the lower federal courts justify applying *Sullivan* immunity in mere matters of "public interest." This highly subjective phrase, vague as it is, I take in any event to mean matters which a federal judge at some point in the past had deemed to be of "public interest," i.e., an entertainer consorting with gangsters (Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440); an accountant involved in a political campaign (Buchanan v. Associated Press, 398 F.Supp. 1196); an entertainer at a celebrated music festival (Man v. Werner [sic] Bros., Inc., 317 F.Supp. 50).

The press has and ought to have absolute freedom to say what it will of any man, but I would be more cautious in immunizing abuses of such vast powers and removing citizens' rights of redress.

I may say finally that the historicity of the building in which the appellant held its business in my view adds nothing to the alleged public interest in such activity.

---

*New York Times Co. v. Sullivan, 376 U.S. 254; Curtis Publishing Co. v. Butts, 388 U.S. 130; Gertz v. Robert Welch, Inc., 418 U.S. 323.

Ironically, segments of the press and media have long urged that the City of Paris be razed to make way for a new department store.

I would deny the judgments.

Newsom, J.

Trial Court:	Superior Court, City and County of San Francisco
Trial Judge:	Hon. Robert W. Merrill

Attorneys

For Plaintiffs/Appellants:	Hoberg, Finger, Brown, Carlson, Cox & Molligan Peter N. Molligan James Geagan 703 Market St., 18th Floor San Francisco, CA 94103
For Defendants/Respondents American Broadcasting and Lund:	Lillick McHose & Charles Robert Fremlin Robert Kavanaugh Gail Heckemeyer 2 Embarcadero Center, 26th Floor San Francisco, CA 94111
For Defendants/Respondents Better Business Bureau, Thurber and Keefer:	Tolpegin & Imai Andre V. Tolpegin 950 Russ Bldg. 235 Montgomery St. San Francisco, CA 94104

Appendix D

Court of Appeal of the State of California
in and for the
First Appellate District

Division One

No. 42363
Superior Court No. .....

Western Institute of Retailing, Inc., etc., et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., etc., et al.,
Defendants and Respondents.

[Filed Feb. 7, 1979]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated Feb-7 1979

ELKINGTON, J.
P.J. Acting

Appendix E

Lillick McHose & Charles
Robert Fremlin
Robert Kavanaugh
Stephanie Van Hoorn
Two Embarcadero Center
San Francisco, California 94111
Telephone: (415) 421-4600
Attorneys for Defendants
American Broadcasting Companies, Inc.,
KGO-TV Channel 7 and Christine Lund

Superior Court of the State of California
City and County of San Francisco

No. 652-227

Western Institute of Retailing, Inc., a corporation, and Vegod Corporation, a corporation,
Plaintiffs,
vs.
American Broadcasting Companies, Inc., KGO-TV Channel 7 and Christine Lund, et al.,
Defendants.

[Filed March 22, 1977]

JUDGMENT

On March 15, 1977, this Court granted the motion of defendants American Broadcasting Companies, Inc. (sued in-

correctly as American Broadcasting Company, KGO-TV Channel 7), and Christine Lund under California Code of Civil Procedure section 437c, to enter judgment for said defendants. In accordance with that order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants American Broadcasting Companies Inc. (sued incorrectly as American Broadcasting Company, KGO-TV Channel 7), and Christine Lund have judgment against plaintiffs Western Institute of Retailing, Inc. and Vegod Corporation, and each of them, and that said defendants recover from plaintiffs their costs of suit in the sum of $4,003.23.

Dated: Mar 22 1977

/s/ Robert W. Merrill

Judge of the Superior Court
Robert W. Merrill

Appendix F

In the Superior Court
of the
State of California

In and For the City and
County of San Francisco

No. 652 227

Western Institute of Retailing, Inc., a corporation, and Vegod Corporation, a corporation,

Plaintiffs,

vs.

American Broadcasting Companies, Inc., KGO-TV Channel 7, Christine Lund, The Better Business Bureau of San Francisco, John Doe Thurber, John Doe Kieffer, et al.,

Defendants.

[Filed Mar. 15, 1977]

JUDGMENT

(In Favor of Defendants Better Business Bureau of San Francisco, Ltd., Charles Thurber, and Louis Keefer)

The above-captioned matter came on regularly before me for Jury Trial on the 8th day of March, 1977; appearing for Plaintiffs Western Institute of Retailing and Vegod Corporation were Messrs: Hoberg, Finger, and Brown, by Peter Molligan and James Geagan; for Defendants American Broadcasting Companies, Inc., a corporation and Christine Lund, Messrs: Lillick, McHose and Charles, by Robert Fremlin and Robert Kavanaugh; and for Defendants Better Business Bureau of San Francisco, Ltd., Louis Keefer, sued and served as John Doe Kiefer and Charles Thurber, sued and served as John Doe Thurber, Messrs: Tolpegin and Imai by Andre V. Tolpegin.

I

The Court thereafter having taken under submission the Motion For Judgment filed by Defendants American Broadcasting Companies, Inc., and Christine Lund, and having read the Memorandum of Points and Authorities and Declarations in support of and in opposition to the said Motion For Judgment; and

II

The Court further having taken Judicial Notice, pursuant to *Evidence Code* §§ 451(f) and 452(g)(h) pursuant to a request by counsel for The Better Business Bureau, Ltd., Charles Thurber and Louis Keefer of the following facts:

1. That the City of Paris Department Store was founded in San Francisco and within the territorial limits of this Court in 1850;

2. That the City of Paris Department Store was in operation on March 10, 1972 within the territorial jurisdiction of this Court;

3. That the possible closing of the City of Paris was reported in the news media; and

4. That the "total sale" of the City of Paris in the month of March, 1972, was a subject of newspaper advertising distributed to the public in the territorial jurisdiction of this Court.

III

That based on the foregoing Motions and requests for Judicial Notice, the Court found, on March 9, 1977 that Plaintiffs Western Institute of Retailing, Inc., and Vegod Corporation, are as a matter of law "public figures" within the meaning of *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) and that said Plaintiffs must therefore prove by clear and convincing evidence "actual malice" by all Defendants as defined in *New York Times Company v. Sullivan,* 376 U.S. 254 (1976); and

IV

The Court having read the following stipulation, entered into by all of the parties to the above-entitled action, to wit as follows:

1. That the Motion for entry of Judgment by Defendants American Broadcasting Companies, Inc., (sued incorrectly as American Broadcasting, KGO-TV Channel 7) and Christine Lund, filed on February 25, 1977, shall be reinstated and deemed a Motion for Summary Judgment pursuant to *California Code of Civil Procedure* § 437(c), that Defendants Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis B. Keefer shall be deemed to have joined in said Motion, and that said Motion is proper in form and is timely.

2. That Plaintiffs Western Institute of Retailing, Inc., and Vegod Corporation are unable to prove that the action of the Defendants and each of them, alleged in the Complaint herein were taken with actual malice within the meaning of *New York Times v. Sullivan,* 376 U.S. 254 (1964); and there being good and sufficient cause shown:

It is hereby ordered, judged and decreed as follows:

That Defendants Better Business Bureau of San Francisco, Ltd., a corporation, Louis Keefer, sued and served as John Doe Kiefer, and Charles R. Thurber, sued and served herein as John Doe Thurber have Judgment against Plaintiffs Western Institute of Retailing, Inc., a corporation and Vegod Corporation, and that said Defendants shall recover all their allowable costs.

Dated:

/s/ Robert W. Merrill
Judge of the Superior Court

Approved as to Form:
Hoberg, Finger & Brown

By: /s/ Peter Molligan
Attorneys for Plaintiff
Western Institute of
Retailing, Inc., and Vegod
Corporation

Dated: 3-14-77

Lillick McHose & Charles

By: /s/ Robert Fremlin
Attorneys for Defendants
American Broadcasting
Companies, Inc., and
Christine Lund

Dated: March 15, 1977